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TRANSMILE GROUP BHD & ANOR

v.

MALAYSIAN TRUSTEE BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[ORIGINATING PETITION NO: D-26NCC-30-2011]
20 FEBRUARY 2012

C ***COMPANIES AND CORPORATIONS:*** *Schemes of arrangement - Unsecured creditors - Whether better for court to wind up debtor than approve schemes of arrangement - Whether question one of commercial sensibility which scheme creditors were better positioned than court to decide - Whether schemes fair equitable and bona fide*

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The two petitioners herein sought the court's sanction to implement debt restructuring schemes of arrangement ('the schemes') between each of them and their respective scheme creditors pursuant to s. 176(3) of the Companies Act 1965 ('CA'). The second respondent ('TAS') was the main operating subsidiary of the first respondent ('TGB') and was insolvent. TAS was the principal borrower to the respondents while TGB had guaranteed loans granted by some of the respondents to its wholly-owned subsidiaries. The respondents were all unsecured creditors and consisted of medium term notes holders, syndicated term lenders and convertible bond holders. The first defendant ('MTB') objected to the sanctioning of the schemes on the grounds, *inter alia*, that: (i) the statutory requirements under s. 176 had not been complied with; (ii) the statutory majority of creditors were not acting *bona fide* and were coercing the minority to promote interests adverse to themselves; (iii) the schemes were not ones an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, might reasonably approve; (iii) that some of the financing arrangements between the parties were illegal; and (iv) the creditors in the schemes would benefit more from a winding-up of TAS rather than from the implementation of the schemes.

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Held (sanctioning schemes):

I **(1)** The majority of the scheme creditors had come to a commercial decision that adopting the schemes was a better alternative than winding-up TAS. It was not possible or feasible to foresee which option necessarily granted the bigger

benefit to the creditors. It was essentially a question of commercial sensibility which the scheme creditors were far better positioned to consider and decide than the court. The court ought not to embark on a careful analysis and dissection of the relative merits of one scheme as opposed to another. (para 102)

(2) All the statutory requirements of s. 176 of the CA had been complied with. The meetings were properly constituted and the schemes were approved by the requisite majorities. There was no factual basis for the court to discount or disregard the votes of any of the scheme creditors who voted in support of the schemes on the basis they had such personal or special interests in supporting the proposals that their views could not be regarded as fairly representative of the class in question. (para 103)

(3) The schemes appeared to be such that an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, might reasonably approve. The schemes appeared to be fair and equitable and the majority of the scheme creditors appeared to have acted *bona fide*. There was sufficient basis to conclude the schemes were for the benefit of the creditors as a whole. (para 104)

Case(s) referred to:

Edward Nelson & Co Ltd v. Faber & Co [1903] 2 KB 367 ***(refd)***
In Re Sateras Resources (Malaysia) Bhd [2005] 6 CLJ 194 HC ***(refd)***
Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***
Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 SC ***(refd)***
Longley & Anor v. Solar Systems Pty Ltd (2010) 81 ACSR 517 ***(refd)***
New Hampshire Insurance Co v. Magellan Reinsurance Co Ltd [2009] UKPC 33 ***(refd)***
Parmalat Capital Finance Ltd v. Food Holdings Ltd (In Liq) [2008] BCC 371 ***(refd)***
Primus (Malaysia) Sdn Bhd v. Rin Kei Mei & Ors [2012] 1 CLJ 176 FC ***(refd)***
Re Alabama, New Orleans, Texas and Pacific Junction Railway Co (1891) 1 Ch 2313 ***(refd)***
Re Axa Asia Pacific Holdings Ltd [2011] VSC 4 ***(refd)***
Re Butterworth Products & Industries Sdn Bhd [1991] 3 CLJ 1762; [1991] 2 CLJ (Rep) 385 HC ***(refd)***
Re Cashcard Australia Ltd [2004] FCA 223; [2004] 48 ACSR 738 ***(refd)***
Re Equitable Life Assurance Society [2002] 2 BCLC 510 ***(refd)***
Re Hawk Insurance Co Ltd [2002] BCC 300 ***(refd)***
Re Jax Marine Pty Ltd [1967] 1 MSWR 145 ***(refd)***
Re Kaupthing Singer and Friedlander Ltd [2011] UKSC 48 ***(refd)***

Re Lehman Brothers International (Europe) [2009] 1 EWHC Civ 1161 ***(refd)***
Re Quintette (1991) ACWS (3d) 959 ***(refd)***
Re Reliance National Asia Re Pte Ltd [2007] SGHC 206 ***(refd)***
Re Sonodyne International Ltd [1994] 15 ACSR 494 ***(refd)***
Re Steel Wing Company Limited [1921] 1 Ch 349 ***(refd)***
Sovereign Life Assurance Co v. Dodd [1892] 2 QB 573 ***(refd)***
The Oriental Insurance Co Ltd v. Reliance National Asia Re Pte Ltd [2008] 3 SLR 121 ***(refd)***
UDL Argos Engineering & Heavy Industries Co Ltd v. Li Oi Lin [2002] 1 HKC 172 ***(refd)***
Yat Tung Investment Co v. Dao Heng Bank & Anor [1975] AC 581 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 6, 176(1), (3), (10)
Exchange Control Act 1953, s. 4(2)

Companies Act 1985 [UK], s. 425
Companies Ordinance (Cap 32) [HK], s. 166

Other source(s) referred to:
Buckley on the Companies Act, 14th edn, 1981, pp 473-474
Halsburys' Laws of England, 5th edn, vol 13, paras 13-14

For the petitioners - S Suhendran (SY Soh with him); M/s Kadir, Andri & Partners
For the 1st respondent - Lim Kian Leong (Paul Ngooi with him); M/s Lim Kian Leong & Co
For the 2nd-13th respondents - Rabindra Nathan (Allister Tan with him); M/s Shearn Delamore & Co
For the 14th respondent - Azhar Azizan Harun; M/s Cheang & Ariff

Reported by Ashok Kumar

JUDGMENT

Nallini Pathmanathan J:

[1] This is a petition presented by Transmile Group Berhad ('TGB') and Transmile Air Services Sdn Bhd ('TAS') seeking the sanction of this court for the schemes of arrangement between each of them and their respective scheme creditors pursuant to s. 176(3) of the Companies Act 1965. Section 176(3) provides as follows:

(3) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall if approved by order of the Court be binding on all the creditors or class of creditors or on the members or class of members (as the case may be) and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

Brief Facts

[2] The salient facts relating to this petition are comprehensively set out in the submissions of the petitioners and the first respondent, Malaysian Trustee Berhad ('MTB') and I adopt the same. TAS is the main operating subsidiary of TGB. Its principal activity is to provide cargo services. TAS is insolvent. It is unable to meet the payments due to its lenders comprising medium term notes holders, ('MTNs'), syndicated term lenders, ('STLs') and convertible bond special purpose vehicle ('CB SPV') through which the convertible bond holders claim.

[3] MTB, the first respondent is the trustee for the holders of medium term notes issued by TAS in 2003. It is not in dispute that MTB is the creditor of TAS as trustee for the MTN holders. The debt due and owing to MTB is RM111.8 million as at 30 December 2010. The debt is an unsecured debt.

[4] The 2nd to 13th respondents, R2-MTB3 or the syndicated term lenders are bankers. *Vide* a facility agreement dated 16 May 2005, the STLs granted an unsecured syndicated term loan of USD100 million to Transmile Air (SPV) Limited ('STL SPV'), a Labuan company and a wholly owned subsidiary of TGB. TGB guaranteed this loan.

[5] STL SPV channelled or on-lent these loan monies to TAS in 2005. This loan is also unsecured.

[6] After this, STL SPV was wound up on 11 August 2010. By an assignment dated 7 September 2010 ('the assignment') STP SPV assigned the debt owing by TAS to it, onto each of the STLs on a pro-rata basis. As a consequence of the assignment, each of the STLs became direct individual creditors of TAS. This is not in dispute. As at 30 December 2010 the amount due to the STLs was 210.4 million.

[7] The fourteenth respondent, CB SPV is a Labuan company and a wholly owned subsidiary of TGB. CB SPV issued convertible bonds in 2005 constituted by a trust deed dated 17 May 2005. TGB guaranteed the convertible bonds. CB SPV then channelled or on lent the bond proceeds to TAS in 2005. This loan is also unsecured. As at 30 December 2010, the debt due to CB SPV is RM219.3 million.

[8] On 13 July 2010 TGB and TAS filed an Originating Summons No. D-22-NCC-239-2010 ('the s. 176 OS') for, *inter alia*, leave to convene respective creditors meetings of TGB and TAS to approve a debt restructuring scheme pursuant to s. 176(1) of the Companies Act 1965 and a restraining order under s. 176(10). The basis of the scheme was that all bankers would participate *pari passu* and form part of the same class of creditors.

[9] In the s. 176 OS, MTB raised a preliminary issue relating to the priority of claims. In essence MTB claimed that by virtue of cl. 10.1(cc) of the MTN trust deed, the debts owing to the STLs and CB SPV are subordinated to the loan of the MTN holders. The STLs and CB SPV contend, to the contrary that their claims rank *pari passu* with that of MTNs. The preliminary issue was framed by consent of the parties thus:

> ... The preliminary issue to be determined by this Honourable Court is whether the amount owing by the 2nd Applicant (TAS) to the 1st Respondent (MTB) has priority over:
>
> 1.1 The amount originally owing by TAS to Transmile Air (SPV) Limited (STL SPV), that has since been assigned by STL SPV to the 2nd to 13th Respondents (STLs); and
>
> 1.2 The amount owing by TAS to the 14th Respondent (CB SPV)"

[10] On 22 December 2010 George Varghese JC (now judge of the High Court) answered the preliminary issue in the negative. His Lordship held, *inter alia*, as follows:

> ... In the upshot, my answer to the preliminary issue was in the negative. The unsecured debt arising from the MTN loan to TAS did not have any better right or priority of the other unsecured debts of STLs and CB holders. The MTN debts must rank *pari passu* with the other scheme creditors.

[11] MTB appealed against this decision to the Court of Appeal which dismissed MTB's appeal on 21 November 2011. The result is that all the MTNs, STLs and CB SPV are to rank *pari passu*.

The Debt Restructuring Schemes

[12] The petitioners seek the court's approval of:

(a) A scheme of arrangement between TAS and its scheme creditors namely, MTB, STLs, CB SPV and TGB; (the amount owing to TGB arises by reason of the conversion of a portion of convertible bonds to TGB shares for which TAS has to pay TGB)

(b) A scheme of arrangement between TGB and STLs and CB SPV who claim under guarantees given by TGB.

[13] The details of these two restructuring schemes are fully detailed to the court. In essence the scheme of arrangement between TAS and its scheme creditors ('the TAS scheme') is to preserve the value of TAS as a going concern so as to procure an optimum price on its realisation. It involves two parts:

(i) Regularisation of the financial position of TAS by extinguishing all the debt obligations represented by TAS scheme debts;

(ii) Proposed disposal of the restructured TAS within a specified period of time.

[14] Under the regularisation part of the scheme, a transfer of all scheme debts from TAS to a special purpose vehicle (Newco SPV) is proposed. TAS is to guarantee the repayment by Newco SPV of the debts to TAS scheme creditors.

[15] 4 MD-11F Aircraft are to be sold and the proceeds of such sale ('MD-11F proceeds') will also be transferred from TAS to Newco SPV. These proceeds will be paid to TAS scheme creditors (save for TGB). As matters now stand, these proceeds are to be distributed amongst the three creditors *pari passu*. Thereafter TAS will be disposed of, at an enhanced value, it is proposed, in view of the removal of the scheme debts, and as it is a going concern.

[16] Proceeds from the disposal of TAS ('TAS proceeds') are to be applied for the benefit of scheme creditors in the following manner:

(a) MTB, STLs and CB SPV's entitlement to TAS proceeds will be based on the balance sum owing to them after taking into account the distribution of the MD-11F proceeds;

(b) TGB which would, as a creditor be entitled to a portion of the TAS proceeds, and will utilise such portion to pay the TGB scheme creditors which would include STLs and CB SPV.

[17] The disposal of TAS is expected to be completed within nine months of the effective date of the TAS scheme or as extended by the scheme creditors. If the proposed disposal of TAS fails, then TGB shall place TAS in voluntary liquidation and the TAS scheme creditors may enforce the guarantee against TAS. Upon completion of this scheme the TAS scheme creditors would have no claim whatsoever against TAS.

[18] Under the TGB scheme, STLS and CB SPV will release TGB from the guarantees in consideration of which TGB will:

(a) Waive its entitlement to the MD-11F proceeds;

(b) Procure two related companies to waive their debts against TAS;

(c) Complete the proposed TAS disposal under the TAS scheme;

(d) Apply TGB's entitlement of TAS proceeds to TGB scheme creditors;

(e) Assign the TAS proceeds (save for TGB's entitlement) for the benefit of TAS scheme creditors.

[19] The TAS and TGB debt restructuring schemes are inter-conditional. There has been compliance with the requirements of s. 176(3) in that these schemes were approved by the required statutory majority at their respective scheme meetings held on 14 April 2011.

[20] The TAS scheme was approved by 80% in number and 78% in value of the TAS scheme creditors;

[21] The TGB scheme was approved by 87.5% in number and 94% in value of TGB scheme creditors. A

Objections To The Sanction Sought

[22] MTB opposes the sanctioning of the TAS and TGB schemes on the following broad bases: B

(a) Wrongful classification of the classes of creditors;

(b) The votes cast by the STL lenders, CB SPV and TGB in the TAS scheme at the creditors meeting of 14 April 2011 should be disregarded; C

(c) The statutory majority are not acting *bona fide* and are coercing the minority to promote interests adverse to them;

(d) The arrangement is not such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve; D

(e) Illegality

(f) All statutory requirements under s. 176 have not been complied with in that: E

(i) The judgment of the learned judge in the course of his adjudication on the issue of priorities has not been properly applied; F

(ii) Major creditors have been wrongly excluded from the scheme;

(iii) Non-creditors have been wrongly included; G

(iv) R2-MTB3 were erroneously accorded one vote each as opposed to one collective vote *vide* STL SPV;

(v) Accordingly R2-MTB3's votes ought not to have been treated as valid H

(vi) While it was represented by the petitioners that the scheme was put forward entirely for the benefit of the creditors, it appears that the petitioners and shareholders were benefitting and stand to gain from the scheme being sanctioned; I

(vii) It was held out or represented that the projected returns to the shareholders under the schemes far exceeded the projected return under a winding up scenario, when this does not appear to be the case.

The Law

[23] Prior to considering each of these issues in turn, it is relevant to have regard to the general principles by which the court is guided when considering a petition under s. 176(3) of the Companies Act 1965. Learned counsel for MTB in his submissions set out the relevant case law. This is not in dispute. *In Re Sateras Resources (Malaysia) Bhd* [2005] 6 CLJ 194 Ramly Ali J (now JCA) adopted the principles set out in *Buckley on the Companies Act*, 14th edn, 1981, pp. 473-474:

> ... In exercising the power of sanction the Court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting *bona fide* and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve.

The Federal Court of Australia in the case of *Hiberman Friendly Society (NSW) Limited* [2002] FCA 913 stated that:

> Nevertheless, the Court is not a mere rubber stamp and it will look at the arrangement to ensure that it is a reasonable one. If the Court concludes that there is an objection to the arrangement, such that a reasonable person might not approve it, then the Court may refuse to approve the arrangement. The Court must be satisfied that the proposal is at least so fair and reasonable that an intelligent and honest person who is a member of the class of the security holders bound by the arrangement acting alone in respect of his or the interest, as such security holder might approve it ...

[24] In the Hong Kong Court of Final Appeal case of *UDL Argos Engineering & Heavy Industries Co Ltd v. Li Oi Lin* [2002] 1 HKC 172 which was referred to in *Re Sateras Resources* (above), Lord Millett stated as follows after having reviewed the relevant case law on the sanctioning of a scheme of arrangement:

The following principles can be derived from this consistent line of authority:

> It is the responsibility of the company putting forward the Scheme to decide whether to summon a single meeting or more than a meeting. If the meeting or meetings are improperly constituted, objection should be taken on the application for sanction and the company bears the risk that the application will be dismissed.
>
> (1) *Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.*
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> (2) *The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights.*
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> (3) The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class.
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> (4) The Court has no jurisdiction to sanction a Scheme which does not have the approval of the requisite majority of creditors voting at meetings properly constituted in accordance with these principles. Even if it has jurisdiction to sanction a Scheme, however, the Court is not bound to do so.
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> (5) The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question. (emphasis added)

[25] And in the early case of *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 2313 at 243, Bowen LJ put it thus:

> ... Then comes the more serious point, whether this is a compromise or arrangement which is within either of the words of the section or within the true spirit of the legislation; that is to say, whether the court has either jurisdiction to sanction it, or ought to sanction it. I do not think myself that the point of jurisdiction is worth discussing at much length, because everybody will agree that a compromise or agreement which has to be sanctioned by the court must be reasonable, and that no arrangement or compromise can be said to be reasonable in which you can get nothing and give up everything. A reasonable compromise must be a compromise which can, by reasonable people conversant with the subject, be regarded as beneficial to those on both sides who are making it. Now, I have no doubt at all that it would be improper for the court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed be sensible business people to be for the benefit of that class as such, otherwise the sanction of the court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation. It is not that one person should be a victim, and that the rest of the body should feast upon his rights. Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

[26] In *Re Hawk Insurance Co Ltd* [2002] BCC 300 Chadwick LJ had occasion to consider this issue when construing s. 425 of the then English Companies Act 1985 which is similar to s. 176 of the Companies Act 1965:

> ... There are, as I sought to point out in *Re BTR plc* [2000] 1 BCLC 740 at 742, when this court refused permission to appeal from the order made by Jonathan Parker J, three stages in the process by which a compromise or arrangement becomes binding on the company and all its creditors (or all those creditors within the class of creditors with which the compromise or arrangement is made). First, there must be an application to the court under s.425(1) of the Act for an order that a meeting or meetings be summoned. It is at that stage that a decision needs to be taken as to whether or not to summon more than one meeting; and if so, who should be summoned to which meeting. Secondly the scheme proposals are put to the meeting or meetings held in accordance with the order that has been made; and are approved (or not) by the requisite majority in number and value of those present and voting in person or by proxy. Thirdly, if approved at the meeting or meetings, there must be a further application to the court under s.425(2) of the Act to obtain the court's sanction to the compromise or arrangement.

It can be seen that each of those stages serves a distinct purpose. At the first stage, the court directs how the meeting or meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon. The second stage ensures that the proposals are acceptable to at least a majority in number representing three-fourths in value, of those who take the opportunity of being present (in person or by proxy) at the meeting or meetings. *At the third stage the court is concerned (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present or, being present, did not vote in favour of the proposals) receive impartial consideration. As it was put in the BTR case ([2000] 1 BCLC 740 at p.747g-h):*

> *... the court is not bound by the decision of the meeting. A favourable resolution of the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court.* (emphasis added).

[27] With these principles in mind, consideration is now given to each of the issues raised by MTB by way of objection to the sanctioning of the TGB and TAS schemes.

Issue (a): Wrongful Classification Of The Classes Of Creditors

[28] MTB contends that of the 15 scheme creditors under the TAS scheme, 12 are the STL lenders while the others are CB SPV, TGB and MTB. STL SPV, CB SPV and TAS are wholly owned subsidiaries of TGB and are accordingly related corporations by virtue of s. 6 of the Companies Act 1965. TAS has made no distinction between these 15 creditors and has placed them all into a single class of creditors, whereas MTB maintains that these creditors' debts ought to have been subordinated to that of MTB. However the issue of priority has

A been determined definitively by the Court of Appeal. The decision handed down was that the MTN debts did not enjoy any right or priority over the unsecured debts of the STLs and CB holders. As such there is only one class of creditors. The end result is that all creditors are to be ranked *pari passu* with no priority accorded B to MTB. There would therefore appear to be reasonable basis for the classification adopted in the TAS scheme of arrangement.

[29] However MTB points to the fact that on 19 January 2011 this court granted MTB leave and liberty to commence legal C proceedings against TAS for breach of the MTN trust deed. This was prior to the proposed TAS scheme. Subsequently civil suit no. 22NCVC-345-2011 for breach of the trust deed was granted. On 7 October 2011 by consent MTB was granted leave and liberty to apply to include additional causes of action in D misrepresentation in the said suit. Accordingly MTB's claim in that suit is for the sum of RM321,450,556 being the amount of damages required to put MTB in the same position as if cl. 10.1(cc) of the MTN trust deed had been honoured.

E **[30]** Premised then on the subsistence of this civil suit, MTB maintains, it is put into an entirely separate category with rights that are different to and dissimilar from those of the remaining scheme creditors. It is contended that as such they could not sensibly consult together with the other 14 TAS scheme creditors.

F **[31]** MTB also points to the fact that the TAS scheme has not addressed its contingent claim against TAS for a breach of the MTN trust deed *vide* the order of court dated 19 January 2011 which pre-dates the TAS scheme. This contingent right is not shared by the other 14 TAS scheme creditors. Instead the TAS G scheme provides for the extinguishment of all claims against TAS which effectively means the extinguishment of the civil suit. MTB protests against this particularly as all the other creditors were party to and took no objection to the order of 19 January 2011. In summary, MTB maintains that the position of the other H 14 TAS scheme creditors with their ascertained debts are entirely different from the MTNS whose debts, by reason of the civil suit, is rendered uncertain. In other words, as the TAS scheme does not take into account the civil suit and the contingent claim arising therefrom, the classification adopted is flawed. The sanctioning of

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the TAS scheme it is contended, would amount to a confiscation of MTB's contingent claim. This would cause grave injustice to MTB.

[32] The rule as enunciated in *Re UDL Holdings Ltd* (above) is that classification is premised on the rights of the creditors and not in their interests. This is not in dispute. The petitioners argue in response that classification must be considered in the light of the purpose of s. 176. It is a section which provides a mechanism to bind a minority to a scheme which would otherwise require agreement from all scheme creditors. (see *Primus (Malaysia) Sdn Bhd v. Rin Kei Mei & Ors* [2012] 1 CLJ 176 a decision of the Federal Court handed down on 17 November 2011).

[33] The petitioners maintain that the minority should bow to the wishes of the majority and ought not to frustrate an otherwise beneficial scheme. The creation of too many classes is to be avoided as this will give an effective minority the right to veto the entire scheme. They rely on *Re Equitable Life Assurance Society* [2002] 2 BCLC 510 at p. 524:

> ... over-zealous subdivision may, by giving small groups a right of veto, defeat the basic approach of the legislation, which is to enable large groups of people to achieve a compromise or effect an arrangement: *Nordic Bank plc v. International Harvester Australia Ltd* [1982] 2 VT 298 at 301 per Lush J. In the recent Court of Appeal decision in *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 already referred to, Chadwick LJ said this:
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> > ... it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements - so that they should have their own separate meetings, but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group.' In balancing these two considerations, as between the power of the majority and that of the minority, an important factor is that, whereas unnecessary subdivision of a class may thwart a proper scheme altogether because of a veto thereby afforded to a small minority, on the other hand if it is said that there has been unfairness or oppression on the part of the majority in a larger undivided class, the control mechanism

A is the court's scrutiny at the sanction stage: see *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 and *Nordic Bank plc v. International Harvester Australia Ltd* [1982] 2 VR 298 at 301.

B **[34]** And in the Canadian case of *Re Quintette* (1991) ACWS (3d) 959 the approach was similar:

> ... What is being suggested here is that a $10 million guarantor should be put into a separate class thereby giving it a significant power and possibly veto power over the proceedings. CdFI as a
C $10 million tail wants to be allowed to wag the $600 million dog.
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> ...
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> To put the issue in another light, what I must decide is whether the holding of a distinct security by each creditor necessitates a
D separate class of creditor for each, or whether notwithstanding this factor that they each share, nevertheless this factor does not override the grouping into one class of creditors. In my opinion, this decision cannot be made without considering the underlying purpose of the CCAA.
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> E In *Norcen Energy Resources v. Oakwood Petroleums Ltd*, ... after canvassing the few authorities on point, I concluded that the purpose of the CCAA is to allow debtor companies to continue to carry on their business and that necessarily incidental to that purpose is the power to interfere with contractual relations ... I
F went on to note: The CCAA is an Act designed to continue rather than liquidate companies.

[35] On the issue of the damages claimed the petitioners maintain that MTB is essentially canvassing a point that has already been dealt with by Varghese George J in determining the
G priority issue. That has been upheld by the Court of Appeal. Accordingly it is maintained that the issue raised in the civil suit has been effectively adjudicated upon and the point is now *res judicata*. Accordingly, applying the general principles, they maintain that as the claim is doomed to failure, MTB ought not to be
H placed in a separate class and be allowed to veto the entire scheme on this basis.

[36] I have considered the competing submissions of the petitioners, the other creditors and MTB. At first blush it
I appeared to this court that by sanctioning the scheme proposed, there would be an extinguishment of MTB's claim in the civil suit

which appeared to be inequitable and to cause injustice to MTB. To this end, I queried whether there was any other solution that was available to 'keep alive' as it were, MTB's contingent claim. Learned counsel for the petitioners, Mr. Suhendran advised the court that it was possible, if there were no other option, for a portion of the proceeds to be distributed, to be carved out or set aside for the purposes of MTB's claim. The quantum to be set aside would be the difference between the sum sought to be claimed by MTB in the civil suit and the amount proposed to be paid out to MTB under the TAS scheme. Given the size of the civil suit claim, this would a sizeable portion of the scheme proceeds.

[37] The other scheme creditors, namely the STL lenders and CB SPV expressed strenuous objection to this proposal, maintaining that they would be grievously prejudiced by the setting aside of these funds, as it would effectively amount to according MTB the very priority which has been determined against it. They too pointed to the decision of the Court of Appeal in the priority issue and maintained that the claim was effectively caught by *res judicata*.

[38] It appears to this court that the critical factor in deciding on whether or not MTB ought to be classed differently, or whether provision should be made for its contingent claim, turns on whether the plea of *res judicata* is taken correctly. Learned counsel for MTB submitted that the basis for the claim in the civil suit is misrepresentation. The claim is for damages for misrepresentation in the sum of RM321,450,556. This quantum has the effect of putting MTB in the same position as if cl. 10.1(cc) of the MTN trust deed had been honoured. In the TAS scheme however MTB's debt is recognised to the extent of RM111,775,082.21. The basis for MTB's claim as plaintiff in the civil suit is that false representations were made by TAS that it would subordinate related party loans thereby affording MTB priority in relation to such loans, in accordance with cl. 10.1(cc) of the trust deed. They premise this claim of misrepresentation, *inter alia*, on the audited accounts of TAS in prior years where the representation was made that loans to TAS from SPV STL (but in reality from STLs) had been subordinated to the loans from MT to TAS. These representations, made over the years, it is contended, are false.

[39] It will be recalled that in determining the priority issue, Varghese George J made findings *inter alia* to the effect that:

(i) The loans made by STL SPV to TAS did not amount to related party transactions because STL SPV was merely a conduit or channel for loans which were from the STL lenders for the benefit of TAS, rather than STL SPV. This is fortified by the subsequent assignment by STL SPV to the STL lenders on a pro rata basis;

(ii) Accordingly as these loans were not related party transactions, cl. 10.1(cc) did not come into play, and MTB's debts assumed no priority over the STL lenders' debts. As such all these debts ranked *pari passu*.

(iii) These findings were upheld by the Court of Appeal.

[40] It follows from the decision of the Court of Appeal that the monies channelled through STL SPV to TAS from the STL lenders did not amount to related party transactions, as they were not true inter-company loans. The learned JC found that these were effectively loans from the STLs to TAS, which finding the Court of Appeal upheld.

[41] For a plea of misrepresentation to bite, or take effect, MTB is constrained to prove that there was a representation made by TAS which was false. A key element of that representation is that TAS represented that related party transactions had been subordinated to MTB's claim, which representation was untrue. But the Court of Appeal has upheld the finding of the High Court that there were no related party transactions. This follows because the loans were found to be, in substance, loans from the STL lenders to TAS. If indeed there were no related party transactions, then a key element or requirement for the claim of misrepresentation does not exist. This is because there can be no question of a false representation arising in relation to a related party transaction if that underlying related party transaction does not subsist. At present in any event this point is somewhat academic. MTB instituted its claim for a breach of cl. 10.1(cc) and sought to include its claims for misrepresentation and fraudulent representation by way of an amendment. On 11 January 2012 MTB's application to so amend was disallowed and the entire civil suit No. 22NCVC 345-2011

struck out. As matters now stand therefore, the claim for damages for the breach of cl. 10.1(cc) has no merit. It would also amount to *res judicata* to attempt to re agitate that issue in this application for sanction. It follows also that any consequential claim for misrepresentation premised on cl. 10.1(cc) would similarly fail. The contention therefore that the proposed schemes of arrangement unfairly compromises claims against the directors has no merit. The contention of wrongful classification arising from the failure to consider MTB's contingent claim is also therefore without basis or merit. That claim has in fact been struck out.

The Votes Cast By The STL Lenders, CB SPV And TGB In The TAS Scheme At The Creditors Meeting Of 14 April 2011 Should Be Disregarded

[42] MTB contends here that the court ought to disregard or discount the votes cast by the STL lenders, CB SPV and TGB, notwithstanding any entitlement they might have to vote at a meeting as a member of the class concerned, because they have such personal or special interests in supporting the schemes that their views cannot be regarded as fairly representative of the class in question. (see Lord Millet in *UDL Argos Engineering* (*supra*). In support of this contention MTB submits that:

(a) The STL lenders and CB SPV have a special interest or personal interest in voting in favour of the TAS scheme. This is because if they do so, then TGB will, under the terms of the TGB scheme, apply that part of the proceeds of the proposed TAS disposal comprising its share of entitlement in favour of the TGB scheme creditors. The only creditors of TGB under its scheme are the STL lenders and CB SPV. The TGB scheme is, moreover inter-conditional upon the TAS scheme. Therefore, it is contended that in order to obtain the benefits under the TGB scheme, the STL lenders and CB SPV have a special interest in ensuring that the TAS scheme is sanctioned. Additionally TGB also provides that it agrees to waive its entitlement to the MD-11F proceeds only if TAS is not wound up. Under the TAS scheme TGB can however put TAS into voluntary liquidation if its operating licences cannot be disposed of. If so, TGB would obtain a part of the MD-11F proceeds which would then be applied in favour of the STL lenders and CB SPV. Again, it is submitted that this is

A further evidence of a personal or special interest warranting these creditors voting in favour of the TAS scheme as they can 'claw back' more monies through TGB *vide* the TAS scheme.

B **[43]** Finally MTB submitted that the STL lenders and CB SPV have a personal or special interest in voting in favour of the TAS scheme which has the effect of extinguishing all litigations including MTB's suit in the sum of RM433,225,638.21 of which RM321,450,556 is for damages for breach of the trust deed. C This last issue is no longer lives as that suit has been struck out, as explained above. However based on these other factors set out above, MTB maintains that the STL lenders and CB SPV are in a class of their own, bearing a personal or special interest to ensure that the TAS scheme goes through. Accordingly, it is D maintained that these creditors should be in a class of their own and separate from MTB.

[44] In response to these contentions, the petitioners, the STL lenders and CB SPV maintain that the classification of all the E respondents as creditors in one class is premised upon the law relating to classification as expounded in *Re UDL Holdings Ltd* (above). They deny that they enjoy any special or overriding interest in ensuring that the schemes should be sanctioned. Instead they point to the rule is that classification is based on the F rights of the creditors and not interests. As set out above in *Re UDL Holdings Ltd* (above):

> ... The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights The fact that individuals may G hold divergent views based on their private interests and derived from their legal rights against the company is not a ground for calling separate meetings. The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the Scheme must be treated as a compromise or arrangement H with more than one class ...

[45] That this is the correct principle of law is not in dispute. In the instant case, all the respondents are unsecured creditors whose legal rights have been adjudicated as ranking *pari passu*. I It was on this basis that they have been grouped together in one class, while MTB maintains for the reasons above, that as the

STL lenders and SB SPV stand to enjoy a greater benefit from the sanctioning of both schemes, they should have been classified separately.

[46] However in the *Re UDL* case (*supra*) it was further held that the mere fact that a group of shareholders stands to receive a benefit under the scheme by virtue of occupying some other position *vis a vis* the company, such as the status of a creditor, does not warrant their being treated for voting purposes as a class separate from the those who do not occupy that additional position. Lord Millet at p. 182 of the case referred to and cited a passage from the case of *Re Jax Marine Pty Ltd* [1967] 1 MSWR 145:

> ...The fact that this group have an additional interest from the ordinary creditors does not, however, appear to me to go to the length of making their rights so dissimilar from those of the ordinary creditors as to make it impossible for them to consult together ... The existence of this motive or personal interest does not, in my view, preclude the Simthson group from membership of the class of ordinary unsecured creditors ...

[47] In *Sovereign Life Assurance Co v. Dodd* [1892] 2 QB 573 per Bowen LJ and Lord Esher MR, the long accepted test on the classification of creditors was enunciated and continues to be relied upon. The test so enunciated was whether the composition of the class was such that it was not impossible for the class members to consult together with a view to their common interest. In the instant case it would appear that it is not impossible for all the respondents to consult together with a view to their common interest.

[48] The other respondents also point to the fact that the creation of too many classes ought to be discouraged as this would accord a minority group the right to veto an otherwise entirely beneficial scheme. The purpose of s. 176 is to provide a mechanism to bind a minority to a scheme which would otherwise require agreement from all the scheme creditors. In this sense the minority have to give way to the wishes of the majority and so be prevented from frustrating a beneficial scheme. In *Re Equitable Life Assurance Society* [2002] 2 BCLC 510 it was held:

A ... over-zealous subdivision may, by giving small groups a right of veto, defeat the basic approach of the legislation, which is to enable large groups of people to achieve a compromise or effect an arrangement: *Nordic Bank plc v. International Harvester Australia Ltd* [1982] 2 VR 298 at 301 per Lush J. In the recent Court of Appeal decision in *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 at [33, already referred to, Chadwick LJ said this:

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> ... it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements - so that they should have their own separate meetings - but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group.'

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> [46] In balancing these two considerations, as between the power of the majority and that of the minority, an important factor is that, whereas unnecessary subdivision of a class may thwart a proper scheme altogether because of a veto thereby afforded to a small minority, on the other hand if it is said that there has been unfairness or oppression on the part of the majority in a larger undivided class, the control mechanism is the court's scrutiny at the sanction stage: see *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 at [11] - [12], [33] and *Nordic Bank plc v. International Harvester Australia Ltd* [1982] 2 VR 298 at 301.

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[49] At this the sanction stage such unfairness or oppression on the part of the majority in the undivided class of unsecured creditors cannot be said to have been demonstrated on the bases put forward by MTB.

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[50] The possibility that some of the creditors may procure an advantage from additional benefits does not, *ipso facto*, necessitate separate classification. In *Re Cashcard Australia Ltd* [2004] FCA 223; [2004] 48 ACSR 738, a member's scheme conferred additional benefits on two members with different circumstances from other members. This was held not to warrant separate classification. The court held that although there was the possibility of payment of additional benefits, the specified persons' interests

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were not so different or divergent that they could not consult together with the other members. In like manner, the fact that the STL lenders and CB SPV may well enjoy additional benefits by reason of the additional security they enjoy *vis a vis* TGB, does not in itself warrant different classification. The finding of the court that the entire group of unsecured creditors are to rank *pari passu* places them in one class in so far as their legal rights are concerned and the issue of a 'special interest' or benefit neither arises on the factual matrix here nor warrants separate classification. It cannot be reasonably concluded that such unfairness or oppression on the part of the majority has been demonstrated so as to warrant the withholding of sanction.

[51] Finally the fact that the STL lenders and CB SPV also participate in the TGB scheme is irrelevant. This stems primarily from the fact that these creditors started off the original transaction with the benefit of a guarantee which MTB did not. Accordingly these scheme creditors can look to two different scheme companies for satisfaction namely TAS as the principal debtor and TGB as the guarantor.

[52] MTB maintains that these scheme creditors being scheme creditors of both schemes stand to gain more monies if they approve both schemes. However, as has been shown above, the classification of these scheme creditors in the same class as MTB is premised on legal rights and not interests. While the sanctioning court has the power to disregard votes of creditors which are given out of self interest, such self interest has not been demonstrated in the instant case where the STLs and CB SPV are entitled legally to prove in both the TAS and TGB schemes as legitimate creditors. In *Re Kaupthing Singer and Friedlander Ltd* [2011] UKSC 48 at para. 11 (per Lord Walker of Gestingthorpe JSC) it was held as follows:

> ... In the simplest case of suretyship (where the surety has neither given or been provided with security, and has unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability and the secondary right of obtaining an indemnity from PD. *C can (after*

A *due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all.* (emphasis added)

B **[53]** It follows therefore that the STL lenders and CB SPV can proceed against both TGB under the guarantee afforded by it as well as TAS, as the principal debtor in insolvency, with the proviso that there is no recovery of more than 100% of the debt. Accordingly these scheme creditors are entitled and recognised under insolvency law as being creditors of both TGB and TAS.

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[54] In other words the additional benefit or interest that these scheme creditors enjoy under the TGB scheme arise by reason of the different capacity that these scheme creditors enjoy as creditors of TGB under the guarantee, which MTB does not.
D This in itself does not however warrant different treatment of MTB and the other scheme creditors. In so far as the one common scheme under which they are all unsecured creditors is concerned, namely the TAS scheme, the legal rights and benefits enjoyed by each of them as members within a class is the same,
E satisfying the test that it is possible for them as class members to consult together with a view to their common interest.

[55] As such it appears to this court that MTB's contention that it should disregard the votes cast by the STL lenders,
F CB SPV and TGB in the TAS scheme creditors' meeting on 14 November 2011 by reason of their having a special or personal interest is without merit and does not in itself justify a withholding of sanction.

G **Issue (c): The Statutory Majority Are Not Acting *Bona Fide* And Are Coercing The Minority To Promote Interests Adverse To Them**

[56] MTB contends that the TAS scheme is 'highly skewed' in favour of all the other TAS scheme creditors because:

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(i) The STL lenders and CB SPV stand to recover more moneys under the TAS scheme by virtue of them being the only TGB scheme creditors, because proceeds gained by TGB would be applied in their favour. This issue has been dealt with
I exhaustively above in relation to classification. The fact of

additional benefits being available to the STL lenders and CB SPV cannot in itself amount to evidence of the TAS scheme being skewed in favour of these scheme creditors because the additional benefits they enjoy stem from the additional security they procured at the outset of the transaction;

(ii) It is contended by MTB that the STL lenders and CB SPV will be able to extinguish the nuisance and risk of MTB's actions against TAS for breach of the trust deed. Further it is contended that TGB will be able *vide* the TAS scheme to extinguish MTB's civil suit against TAS. Accordingly it is contended that the statutory majority are clearly not acting *bona fide* as they are conclusively restraining MTB from pursuing its rights under the trust deed against TAS. These parties are aware of the civil suit by virtue of the order of this court dated 19 January 2011.

This issue is no longer available or relevant as MTB's civil suit against TAS has been struck out. Accordingly the basis for arguing that the statutory majority are not acting *bona fide* and are in fact acting with a view to suppressing or stifling MTB's civil action no longer has any factual basis;

(iii) MTB further contends that it has not been provided with adequate or sufficient information to assess the incurrence of the debts due to TGB by TAS. MTB is concerned as to whether the related party debts incurred thereto are *bona fide*. MTB complains that TAS failed to disclose information as to how the TGB debts were incurred and that the lack of transparency over TAS's related party debts has affected MTB's ability to consider the scheme fully. They were unable to decide whether they should contest TGB's debts or not. The petitioners respond to this by submitting that TGB's rights as a creditor were genuinely incurred. The amount owing to TGB arose by virtue of the conversion of CB to TGB shares which TAS has to pay TGB for. The petitioners point to the fact that TGB will waive all its claims as a creditor of TAS in respect of the MD-11 proceeds in the event that TAS is not wound up, to maintain that its benefit under the TAS and TGB schemes is not unfair.

(iv) Finally MTB maintains that each of the STL lenders who take their assignment from STL SPV have been erroneously recognised as TAS scheme creditors. This, they maintain, arises because although the debts due and owing by TAS are to one STL SPV, it has spawned twelve individual and separate creditors in the TAS scheme. This in turn, it is maintained, has allowed these creditors to out vote and drown out the voice of minority creditors such as MTB, which is another manner in which the statutory majority had coerced and oppressed MTB under the TAS scheme. The petitioners respond to this by submitting that the twelve creditors are entitled to make claim separately and independently under the TAS scheme by virtue of the assignment of the debt from STL SPV to the STLs. They point to the fact that MTB in fact made no complaint when the STLs intervened in the OS and conceded that they are creditors. It appears to this court that by virtue of the existence of assignment whereby the STL SPV debt was assigned in specie to the STLs, it is the STLs who can now accurately be described as 'creditors' under the TAS scheme. In view of the assignment, STL SPV can no longer be a creditor. Accordingly the fact that there are twelve creditors who make claim arises from a legal and valid assignment and cannot form the basis to allege a lack of *bona fides* or coercion of the minority by the majority.

Issue (d): The Arrangement Is Not Such As An Intelligent And Honest Man, A Member Of The Class Concerned And Acting In Respect Of His Interest, Might Reasonably Approve

[57] By reason of all the matters enumerated above, MTB maintains that the TAS scheme is clearly not such that an intelligent and honest man in the position of MTB, acting in respect of his interest might reasonably approve. In support of this contention, MTB cites *The Oriental Insurance Co Ltd v. Reliance National Asia Re Pte Ltd* [2008] 3 SLR 121 where the court referred with approval to the summary provided by the learned authors of *Palmer*:

> ... In exercising its discretion whether or not to sanction a scheme, the court traditionally as we have seen, has stressed that its function does not extend to usurping the view of the members of creditors ... That approach has never meant, however that provided that the resolutions are duly passed, and that there is no coercion of a minority by a majority the court is bound to confirm the scheme and has no discretion. The court is not a mere rubber stamp ... It will look at the scheme to see that it is a reasonable one: if it concludes that there is 'such an objection to the scheme as that any reasonable man might say that he could not approve it (per Lindley LJ in *Re Alabama, New Orleans, Texas and Pacific Junction Ry Co* [1891] 1 Ch 213 at 239) then the court may refuse to confirm the scheme.

[58] Having considered the foregoing in some detail it cannot be said that there exists such an objection to the scheme on the matters presently examined that warrant a finding that a reasonable man would say that he could not approve it. On the contrary the matters raised thus far do not go so far as to suggest that any such objections have in fact been made out.

Issue (e): Illegality

[59] MTB contends that the STL lenders and CB SPV should not have been recognised as creditors of TAS as the financing arrangement between STL SPV and CB SPV with TAS is tainted with illegality. As STL SPV and CB SPV were merely conduits or agents of TAS for the purposes of channelling or borrowing funds from the STL lenders and CB holders, the corporate veil of STL SPV and CB SPV ought to be lifted. If that is done, then the financing arrangement it is contended, would be in breach of s. 4(2) of the Exchange Control Act 1953, as the direct loan from the STL lenders and CB holders was done without the permission of Bank Negara. It is further contended that these loans are illegal in that they were made to evade withholding tax. It is further contended that the assignment from STL SPV to the STLs is illegal for want of prior approval from Bank Negara.

[60] In summary therefore MTB's contentions are that:

(i) The STLs and CB are not direct creditors of TAS;

(ii) The loans of the STLs and CB are void for illegality in that they contravene exchange control regulations and evade withholding tax;

(iii) The assignment is void for illegality in that no prior approval of Bank Negara was procured. Accordingly it is maintained that the STLs are not creditors of TAS.

[61] The petitioners and the STL lenders and CB SPV meet these contentions by submitting that:

(i) MTB cannot dispute the validity of the loan and the assignment or the status of the STLs and CB SPV as individual creditors as this would amount to *res judicata*. MTB had contended as above to dispute the validity of the loan and assignment and to impugn the status of the STLs as creditors of TAS in the course of arguing that MTB's debt enjoyed priority under the trust deed. These issues were conclusively determined in this court when determining this priority issue and the decision of the High Court was, in turn upheld by the Court of Appeal. The Court of Appeal found that the issues of illegality raised above have no merit. As such these issues are now *res judicata* and MTB is estopped from challenging these creditors' status in court. (see *Henderson v. Henderson* [1843] 3 Hare 100 at 115; *Yat Tung Investment Co v. Dao Heng Bank & Anor* [1975] AC 581).

[62] Equally, the issue of estoppel would apply to preclude the re-agitation of these very same issues. (see *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 CLJ 1). MTB cannot now therefore seek to raise these issues afresh in support of its contention that sanction ought not to be accorded to the TAS scheme.

[63] Further and alternatively, I am persuaded by the submission of learned counsel for the STL lenders who raised the following grounds in support of his contention that MTB is estopped from disputing the rights of these lenders to vote at the TAS scheme meeting:

(i) MTB, in relation to the determination of the preliminary issue on priority, expressed its agreement in the statement of agreed facts, that the STL lenders are creditors of TAS. MTB now seeks to resile from that position;

(ii) Under cl. 2.2(b) and (c) of the facility agreement, each of the STL lenders' rights are separate rights which may be enforced separately. As such upon a declaration of the event of default on 14 May 2008, a separate and distinct debt arose in respect

of each of the STL lenders in proportion to their respective commitments under the facility agreement which each of them is therefore entitled to enforce separately;

(iii) Pursuant to such assignment, each and every STL lender was the recipient of a distribution in specie of the TAS debt, in proportion to their respective share of the amount due to the STL lenders under the loan. Consequently, each STL lender has the status of an individual creditor of TAS;

(iv) Each of the STL lenders as direct creditors of TAS sought to intervene in the High Court on this basis and such intervention was consented to whereby the STL lenders were added as parties to this application as individual creditors of TAS. They are therefore expressly recognised in law as creditors of TAS.

[64] For these reasons this submission of illegality in relation to the loan and assignment must fail.

Issue (f)(i) - (v): The Statutory Requirements Of s. 176 Have Not Been Complied With:

The Judgment Of The Learned Judge In The Course Of His Adjudication On The Issue Of Priorities Has Not Been Properly Applied The 'True Lenders' In Relation To The TAS Debt

[65] MTB contends that the judgment of the learned judge Varghese George JC (as His Lordship then was) was not followed, given that the learned judge held that the 'true lenders' to TAS were the STL lenders and the CB holders and not STL SPV and CB SPV. Accordingly it is submitted that the CB holders were erroneously not recognised as the creditors of TAS and that CB SPV was instead, erroneously recognised as the largest creditor *in lieu* of the CB holders.

[66] As this grievance stems from the decision of the learned judge, it is necessary to consider the judgment in relation to the priority issue. A perusal of the judgment shows that the references to 'true lenders' was made in the context of the adjudication of the following issue, namely 'whether the loans or advances received by TAS through STL SPV and CB SPV were in substance or in essence an 'inter-company loan' in any event'.

Having considered this issue, the learned judge concluded his finding that these loans were not inter-company loans by holding as follows:

> 12.5 The structuring of the loans by process of the 'on lending' by the SPV-conduits to TAS was a mechanism necessitated by foreign exchange regulations stipulated by Bank Negara Malaysia (BNM) as the loans were denominated in US Dollars. The fact that the loan through the SPVs was BNM approved was nothing more than an acknowledgement that such a device or arrangement was required in the context of regulatory safeguards. If it was ever possible, the loans by the STLs or proceeds from CB would have been made direct to TAS rather than through the SPVs but for the applicable foreign currency exchange regulations.
>
> I hold therefore that neither the STL loans nor the CB-proceeds constituted an 'inter-company loan', that is even if clause 10.1(cc) was applicable to and binding on STL-SPV and/or CB-SPV, as argued by the 1st Respondent.
>
> Although on paper it might have had the appearance of an 'inter-company loan', here the true lenders were the STL lenders and the CB holders. STL-SPV and CB-SPV were "mere conduits" only and the funds received through them by TAS were not in any sense an 'inter-company loan'.

[67] It would appear from a perusal of the learned judge's judgment that the statement that the 'true lenders were the STL lenders and CB holders' was made in the context of determining whether or not these loans amounted to inter-company loans. This finding too was made in the context of the construction of cl. 10.1(cc) of the trust deed, for purposes of the priority issue. As such this determination was made in the context of the construction of the contract. I concur with the submissions of learned counsel for the petitioners that the construction of 'inter-company loans' was therefore in relation to cl. 10.1(cc) of the trust deed. Can that finding of a 'true lender' for the purposes of ascertaining whether the advances amounted to inter-company loans within the context of s. 10.1(cc) of the trust deed then be imported and applied directly in the context of s. 176 so as to ascertain whether the CB holders or CB SPV is a creditor of TAS entitled to vote at the scheme creditors' meeting? It would appear not. In determining who is entitled to vote at the scheme creditors' meeting under s. 176 the word 'creditor' has to be

construed within the context of s. 176. In this context, I am persuaded by the submissions of learned counsel for the petitioners that the word 'creditor' in s. 176 has been accorded a specific meaning within the context and nature of the Companies Act 1965. A creditor makes reference to 'persons who are able to prove in a winding up' (see *Butterworth Products & Industries Sdn Bhd, Re* [1991] 3 CLJ 1762; [1991] 2 CLJ (Rep) 385). In *Re Lehman Brothers International (Europe)* [2009] 1 EWHC Civ 1161 the definition has been widened to include persons who have pecuniary claims against the company.

[68] If these definitions are applied in the present factual matrix, the question will be whether CB SPV or the CB holders are owed money by TAS and are able to prove in the winding up of that entity. Notwithstanding the finding of the learned judge that the 'true lenders' are the CBs, it is clear that a legal structure was created to comply with exchange control requirements. Accordingly the strict legal position is that the lender/creditor who is able to prove in the winding up of TAS is CB SPV and not the CB holders. As such CB SPV was correctly recognised as a creditor. MTB's contention that the CBs were not recognised as creditors is therefore not tenable.

[69] Further or alternatively, even if the CB holders were recognised as creditors, the petitioners point out that there would be no difference to the outcome of the scheme meetings. If the CB holders had voted individually the position would have been that seven CBs representing 94.26% in value of those present and voting, voted in favour of the scheme while one CB representing 5.74% in value of those present and voting voted against. CBs representing some US$7.7 million did not attend which means that their non-attendance would be excluded from calculation as the statutory majority is based on those 'present' and 'voting'. The requisite majority would have been obtained.

[70] As such the contention that CB SPV was erroneously allowed to vote and that the CB holders were erroneously not allowed to vote at the meeting has no merit.

The STL Lenders Should Not Have Been Accorded Individual Votes

[71] In like manner it is contended that STL SPV as the 'true lender' assigned its rights to the STL lenders, who having obtained their rights through an assignment could not obtain greater rights

than the assignor, STL SPV. Accordingly it is contended that they were therefore collectively entitled to only one vote as opposed to individual votes. In support of this contention MTB maintains that pursuant to the assignment the STL lenders took the STL SPV's rights to the debt pro rata. The assignees could not acquire more rights than the assignor, and should accordingly have been accorded only one vote at the TAS scheme creditors meeting.

[72] The STL lenders, R2-R13, respond to this contention by maintaining that their status as individual creditors of TAS stems from the assignment of the debt. The debt which was so assigned is a chose in action which is capable of assignment in law and in equity. (see *Halsburys' Laws of England* 5th edn. vol. 13 at paras. 13 to 14). Part of a debt cannot be assigned in law but only in equity.

[73] The only substantive asset of STL SPV was the debt due and owing from TAS. The liquidator of STL SPV was therefore entitled in law, to distribute this asset or the proceeds of realisation of the asset to its creditors.

[74] Under cl. 2.2(b) of the STL facility agreement the rights of each of the lenders is separate and independent. Moreover any debt arising under the STL facility agreement to the lenders 'shall be a separate and independent debt'. Clause 2.2(c) of the facility agreement provides that the lenders may separately enforce their rights under the facility agreement. The governing law of the STL facility is English law by virtue of cl. 36 of the STL facility agreement. The English law position has been affirmed *vide* an affidavit stipulating that each of the STL lender's rights had crystallised and each lender was entitled to sue for its portion of the overall debt due. This contention was not rebutted. It follows from the foregoing, and I am in agreement with learned counsel for the STL lenders that each of them, ie, R2 to R13 is an individual creditor in its own right, in respect of the separate and distinct amount due to each of them. As such each distinct amount constitutes a separate debt.

[75] As STP SPV was in liquidation the liquidator was entitled to make an in specie distribution of its assets to its creditors (see *Longley & Anor v. Solar Systems Pty Ltd* (2010) 81 ACSR 517 at 520). In the instant case:

(i) STL SPV was under voluntary liquidation;

(ii) Each of the STL lenders, R2 to R13, were separate and individual creditors of STL SPV;

(iii) The TAS debt was the sole asset of STL SPV;

(iv) It is a chose in action;

(v) The primary obligation of the liquidator of STL SPV would have been to pay each of R2 to R13, in cash, as they were creditors;

(vi) The liquidator could substitute, by agreement of R2 to R13 as creditors, the distribution of property, namely the TAS debt in substitution for cash;

(vii) The TAS debt was so assigned to R2 - R3.

(viii) R2-R13 became equitable assignees of parts of the total TAS debt;

(ix) An equitable assignee is regarded as a creditor for purposes of the Companies Act 1965 (see *Re Steel Wing Company Limited* [1921] 1 Ch 349; *Parmalat Capital Finance Ltd v. Food Holdings Ltd (In Liq)* [2008] BCC 371; *New Hampshire Insurance Co v. Magellan Reinsurance Co Ltd* [2009] UKPC 33).

[76] It follows from the foregoing analysis, as submitted by learned counsel for R2 - R13, that R2 - R13 or the STL lenders, are individual creditors of TAS. They are accordingly entitled to a vote each at the scheme creditors meeting.

STL Lenders' Or R2 - MTB3's Votes Should Not Have Been Treated As Valid

[77] In essence MTB contends that the decision as to whether to support or oppose the scheme and as to the voting at the class meeting by the STL lenders is subject to a voting majority threshold of 66 2/3%. It is submitted by MTB that based on the STL facility agreement a majority of 66 2/3% of lenders by quantum would be required to make any decision of the STL lenders. It is further contended that STL SPV's right to vote could only have been activated by a 66 2/3% majority of the STL lenders and so as assignees, the STL lenders would have been

bound by the same constraint. If then the STLS should only have had one vote between them they did not have the requisite majority to caste that vote as only 46% voted in favour, 10% voted against and 49% did not vote.

[78] The STL lenders maintain that this reasoning is fallacious. They point to the STL facility agreement and maintain that MTB has misconstrued the same. The 66 2/3% majority applies only where there is no contrary indication in the facility agreement. The position as regards the separate debt and the separate right of enforcement of the debt is evident from cl. 2.2 (b) and (c) of the STL facility agreement. Therefore the 66 2/3% majority is irrelevant and inapplicable.

[79] Finally and alternatively, learned counsel for the STL lenders submitted that even if the 12 STL lenders had been reduced to only one representative entitled to vote at the class meeting of TAS, MTB would still have been outnumbered. This, it is pointed out, is because the other members present on the date of the meeting would have been:

(a) MTB

(b) TGB

(c) Representative of the STL lenders; and

(d) Representative of the CB holders

[80] It is not in dispute that TGB, the STL lenders and the CB holders voted in favour of the TAS scheme. That meant that MTB would have been outvoted in pure head count terms by a simple majority even if the STL lenders had been reduced to a single representative.

[81] It was also submitted by MTB that the effect of some STL lenders abstaining meant that the STL lender vote does not reflect the STL group as a whole. However s. 176 envisages a vote being taken only from those creditors that are present and voting in person or by proxy. It further envisages a simple majority in the number of creditors voting within a class and a separate majority of 75% in value of such creditors. As such a majority was in fact procured the contention that the STL vote was not reflected is misconceived.

STL SPV And Equities

[82] MTB submitted that the STL lenders having acquired the TAS debt from SPL SPV could not acquire any better right than the assignor, namely SPL SPV which only had one vote. Accordingly the contention was made that there could not be a spawning of twelve votes in favour of each of the ST lenders from R2 - R13. As a general principle assignees of a debt are subject to the principle that the assignee takes the chose in action subject to all 'prior equities'. What is meant by 'equities' within this context? It refers to whatever defences or set-off that the debtor would have been entitled to set up against the assignor up to the time of the assignment (*Edward Nelson & Co Ltd v. Faber & Co* [1903] 2 KB 367 at 375). As such, the right to vote at a class meeting of TAS is not an 'equity' in the sense referred to above. STL SPV did not have an accrued or vested right to vote which was capable of assignment to the STL lenders. I accept the submission of learned counsel for the STL lenders that STL SPV was entitled to vote at a scheme class meeting only if it remained a creditor by the time the class meeting was convened. However that was not the case here. By the time the meeting was so convened, under a *bona fide* process whereby the liquidator made an in specie distribution of the TAS debt pro rata, each of the STL lenders became entitled to pursue their separate debts and become individual creditors of TAS in their own right. In short each STL lender became a separate creditor, allowing each STL lender one vote. It would therefore appear that the contention that STL SPV had only one accrued vote which was capable of assignment to the assignees collectively is without merit.

Petitioners And Shareholders – Are They Obtaining Personal Benefit From The Sanctioning Of The TAS Scheme?

[83] The petitioners submitted that under both schemes they did not procure a share in the assets. The assets will instead be applied towards the payment of creditors. There is therefore no pecuniary benefit to the petitioners.

[84] However MTB's objection pertains to the fact that if the TAS scheme receives the sanction of this court, all claims against the petitioners, directors, former directors and officers would be extinguished. More significantly, MTB's complaint centres around its civil claim for misrepresentation brought against the petitioners

and its former directors centring around cl. 10.1(cc). In essence MTB's claim is that there was a breach of cl. 10.1(cc) in that the on-lending from the SPVs were 'inter-company loans' which were not subordinated to the claims of MTB. Additionally MTB maintained that it had a claim against TAS and its previous and current directors for misrepresentation in relation to the same clause. MTB maintains that upon the TAS scheme being sanctioned, the petitioners and its directors, former and current would be absolved from claims.

[85] The petitioners meet this contention by relying on *res judicata*. They point out that MTB's complaint turns on whether the on-lendings by the SPVs were 'inter-company' loans, a matter which has been adjudicated upon in the High Court and upheld by the Court of Appeal. More significantly, the High Court has now disallowed amendments pertaining to misrepresentation and fraudulent representation and struck out MTB's suit against the petitioner holding, *inter alia*, that *res judicata* applied. As such there is no suit presently pending by MTB against the petitioner and this objection that the scheme unfairly compromises its claims against the directors of the petitioners must therefore fail.

The Benefits To The Creditors Of Winding Up As Opposed To The Schemes

[86] MTB maintains that the petitioner has merely stated that the projected return based on the TAS scheme will be better than a winding up scenario, but has failed to produce any credible evidence to support this contention. MTB submitted that the evidence currently available shows that the projected recovery under the TAS scheme will be less than that projected in under liquidation. In summary, MTB refers to the petitioner's initial averments to the effect that on liquidation, the recovery for the TAS scheme creditors would be 37.1 sen per RM1 debt, whereas based on the scheme, the projected recovery would be 57.6 sen. The latter projection is premised on the sale of TAS as a going concern at RM129.4 million. MTB complains that the petitioners appear to have made no adjustment for this projection notwithstanding that the only proposal received was an 'indicative non-binding proposal' from DRB - Hicom to acquire TAS for RM35 million. However that offer was not pursued. A further factor is the disclosure by the petitioners that they have already

spent RM32.9 million from TAS cash reserves to maintain the operations of TAS as a going concern. This is an ongoing expense. Given the current scenario therefore, MTB maintains that the projected recovery in a winding up scenario is likely to be considerably better. It points to the fact that TAS's operations are losing money and that the petitioners propose to keep using TAS's cash to maintain operations for another nine months. MTB submits that as matters are being currently managed, only three categories of persons appear to benefit from the scheme, namely:

(a) The petitioners, their directors, former directors and officers who will be absolved from all liability;

(b) Current trade creditors of TAS who appear to be receiving payment in full for supplying to TAS; and

(c) The proposed purchaser of TAS as the purchase price appears to be a fraction of that projected in the scheme.

[87] MTB contends that rather than sanctioning such a scheme it would be far preferable for TAS to be wound up and a liquidator appointed who could investigate how TAS came to be placed in its current situation, whether there was any misconduct by the petitioners and their directors which requires action, whether any monies expended thus far in maintaining the operations of TAS can be 'clawed back' and to stop the further maintenance of TAS as a going concern, which is a costly exercise.

[88] In response, the petitioners point to the fact that they have kept the scheme creditors advised of the current situation. They point to a presentation conducted on 21 October 2011 at which MTB was present, when adjusted figures were presented to the scheme creditors. These adjusted figures assume a disposal of TAS at RM35 million. However that may no longer be accurate as presently there is no proposal for the purchase of TAS.

[89] Notwithstanding this, the petitioners submit that the sale of TAS as a going concern will enhance the sale value, rather than it being disposed of on liquidation when it will lose its Air Operator Certificate which has recently been renewed. The licence is not transferable. The petitioners further submit that there is nothing unusual in a business being maintained to enable the sale

of its assets at a higher value. If however TAS is wound up, its key personnel would have to leave and TAS's operations would effectively cease. Notwithstanding the costs of maintaining TAS per month, the petitioners maintain that ceasing operations would bring more harm to TAS and the scheme creditors because:

(i) The termination of the Air Operator Certificate on winding up would render TAS worthless to any potential investor;

(ii) Any value attributable to the Air Operator Certificate would be lost.

[90] For these reasons the petitioners maintain that it is necessary to maintain TAS as a going concern. This necessitates the payment of current creditors to maintain the business. This too, it is submitted is not unusual in liquidation.

[91] The petitioners challenge MTB's contention that the return in liquidation may be higher than under the schemes. They maintain that TAS will not be kept alive indefinitely. The TAS disposal is to be completed within nine months from the effective date of the TAS scheme or such extended time as may be granted but in the event such disposal cannot be effected within this period, the TAS scheme creditors will decide whether to grant an extension of time or whether TAS should be put into voluntary liquidation.

[92] The other respondents maintained that notwithstanding the fact that there was currently no prospective purchaser, they continued to support the implementation of the schemes and therefore supported the application for sanction.

[93] A perusal of the figures pertaining to the two competing scenarios, namely the sanctioning of the schemes which will facilitate a disposal of TAS as a going concern on the one hand, and a liquidation scenario on the other hand, does not clearly evince far greater benefits under the scheme. The situation is uncertain.

[94] Should the court place reliance on the liquidation versus disposal analysis put forward by MTB and together with the costs of maintaining TAS monthly, conclude that it would be better to liquidate than to proceed with the schemes? Or should the court

take cognisance of the views of the majority of the creditors who support the petitioners' stance that the disposal of TAS as a going concern is likely to attract a better disposal price, notwithstanding that at present there are no prospective purchasers?

[95] What is evident not only from the votes taken at the scheme creditors' meeting but even as of the date of hearing, when all scheme creditors were present, was that the majority are clearly in favour of proceeding with the schemes. In other words the majority of the creditors, save for MTB, want a sale on a going concern basis.

[96] Returning to the question I considered at the outset of the case, namely, what is the function of the court tasked with the duty of deciding whether or not to sanction the TAS scheme and the TGB scheme under s. 176? The third stage of the three stage test enunciated in *Re Hawk Insurance Co Ltd* [2002] BCC 300 by Chadwick LJ is of relevance and is directly applicable here. For ease of reference I reproduce the third stage:

> *... At the third stage the court is concerned (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present or, being present, did not vote in favour of the proposals) receive impartial consideration. As it was put in the BTR case ([2000] 1 BCLC 740 at p.747g-h):*
>
> > *... the court is not bound by the decision of the meeting. A favourable resolution of the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court.* (emphasis added).

[97] And in *Re UDL Holdings Ltd* [2002] 1 HKC 172, referred to earlier, Lord Millet, after reproducing s. 166 of the Hong Kong Companies Ordinance (Cap 32) which is *pari materia* with s. 176 of the Companies Act 1965 went on to reiterate the three stage

process as enunciated by Chadwick LJ in *Re Hawk Insurance Co Ltd* (above). On the issue of sanction Lord Millet outlined the following principles (at p. 184):

> (5) The court has no jurisdiction to sanction a scheme which does not have the approval of the requisite majority of creditors voting at meetings properly constituted in accordance with these principles. Even if it has jurisdiction to sanction a scheme, however, the court is not bound to do so.
>
> (6) The court will decline to sanction a scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned. To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question.

[98] In the case of *Re Axa Asia Pacific Holdings Ltd* [2011] VSC 4 Croft J set out the duty of the court thus:

> ... At this present stage of the proceedings, it is useful to make some reference to the nature of the discretion of the court to approve a scheme. In *Re Permanent Trustee Co Ltd*, Barrett J reviewed some of the authorities of the nature of this discretion:
>
> > Proceed to the central question whether the court should exercise its discretion in favour of approving the scheme. There is no exhaustive statement of the matters as to which the court must be satisfied before granting approval. Indeed courts have been reluctant to attempt any comprehensive or compendious statement of relevant criteria. I refer to the judgment of MacFarlan in *RE A W Allen Ltd* [1930] VR 251:
> >
> > > In my opinion nothing can be more dangerous than to attempt to determine the conferring or withholding of the Court's sanction by the application of any formula ... The authorities relied on are all useful as directing the considerations which have occurred to, or have been brought to the minds of, other judges and which they have properly held to be of importance. Considerations which are of the greatest

> weight in one class of case may be ... outweighed by circumstances not present in the former. If the Legislature had desired to say that the Court should sanction an arrangement if the necessary majorities were obtained and the conditions of reasonableness and absence of oppression (or any others definable in advance) existed, it would have been easy to say so. It has chosen not to do so.
>
> It is nevertheless clear that the court must form a favourable view as to the reasonableness of the compromise or arrangement. This was established in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 ...

[99] Croft J concluded as follows:

> ... It is clear that the role of the court is supervisory, but that this does not involve the "second guessing" of the commercial judgment of the shareholders or to substitute its own commercial judgment. The nature of the jurisdiction was described by Emmett J in *Re Central Pacific Minerals NL* as follows:
>
> > The jurisdiction of the Court in relation to an arrangement is supervisory, in the sense that the Court is concerned to be satisfied that there has been an absence of oppression and that the arrangement is one that is capable of being accepted. For example, the Court will withhold its approval where a majority is shown to be acting in bad faith or where a majority's acceptance is in the nature of a fraud on the minority. The Court will, of course, generally take the view that the shareholders are the best judges of whether an arrangement is to their commercial advantage and will be reluctant to make decisions contrary to the views of security holders expressed at the meetings. The function of the Court does not extend to usurping the views of the relevant security holders.

[100] In *Re Sonodyne International Ltd* [1994] 15 ACSR 494 Hayne J had occasion to consider the issue, which he posed thus:

> ... in the end the question that is presented at this stage of the process of a company propounding and implementing a scheme of arrangement is whether the scheme is such that it could reasonably be supposed by sensible business people to be for the benefit of the class concerned. That is, the test in the present case is whether it is reasonable to suppose that sensible business people might consider that the arrangement proposed by the company is of benefit to its members.

> I do not consider that that question requires, or in the circumstances of this case permits the court to embark upon a nice analysis of whether the chance that is now offered to members to derive some benefit from their shareholding is likely or unlikely to occur. Of course, there may be cases in which the appearance of benefit to members or creditors is properly classified as illusory but I do not consider that that is this case. It has often been said both in the context of schemes of arrangement and elsewhere that the court is not to substitute its judgment on affairs of business for the judgment of the business people concerned. If the members of this company consider that the chance is worth pursuing then they may choose to vote for it. If they do not, or for some other reason they consider that the scheme should not be approved, then they will vote against it ...

[101] Although this statement was made in the context of the second stage of this three stage process and we are at the third stage, the reasoning applied there is of relevance.

[102] In the instant case, applying the foregoing principles of law to the present factual matrix which has been explored exhaustively prior to this, it appears to this court that the statutory requirements of s. 176 have been met. It would appear that the meetings were properly constituted and that the schemes were approved by the requisite majorities. As such the result of the meeting fairly reflected the views of the creditors concerned. There was no factual basis to warrant this court discounting or disregarding the votes of any of the scheme creditors who voted in support of the scheme on the basis that they had such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question.

[103] This then leaves the sole issue whether the scheme creditors would benefit more from a winding up of TAS rather than the implementation of the TAS scheme, which MTB maintains is sufficient reason for this court to withhold sanction. This amounts to an assessment of the relative merits of the implementation of the TAS scheme versus the benefits accruing in a winding up. Ultimately it is a question of commercial viability/feasibility. What is being sought is the court's assessment of the feasibility of one option over the other. The court here ought not to embark on a careful analysis and dissection of the relative merits of one scheme as opposed to another (see also *Re Reliance National Asia Re Pte Ltd* [2007] SGHC 206).

[104] The court ought to be satisfied in deciding on the issue of sanction that the benefit to the creditors is not illusory or very near illusory. That is certainly not the case here. It is not possible or feasible to foresee at this juncture which option will necessarily grant the bigger benefit to the creditors. However that is essentially a question of commercial sensibility which the scheme creditors are far better positioned to consider and decide than the court. Here the majority of the scheme creditors have come to a commercial decision that adopting the scheme would offer them a better alternative than to wind up TAS. This court is not to substitute its judgment on affairs of business for the judgment of business persons, ie, the scheme creditors concerned. It is therefore clear that:

(i) All the statutory requirements of s. 176 have been complied with;

(ii) A majority of the scheme creditors have come to a commercial decision that adopting the schemes would offer them a better alternative than to wind up TAS, and maintain that decision as of the date of this hearing;

(iii) The schemes appear to be such that an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, might reasonably approve;

(iv) The schemes appear to be fair and equitable, and the majority of the scheme creditors appear to have acted *bona fide*.

[105] As such, there is sufficient basis to conclude that the schemes are for the benefit of the creditors as a whole, and accordingly I exercise my discretion to sanction the schemes.